

April 18, 2012

To whom it may concern:

CallAssistant, L.C. (CallAssistant) has retained the undersigned to render a legal analysis of its Echo call technology (Echo) as related to compliance with the Telephone Consumer Protection Act (TCPA).<sup>1</sup> CallAssistant sought me out to render this opinion because of my extensive work in the consumer protection field, including serving as Senior Deputy Attorney General of the Ohio Attorney General's consumer protection section and eight years of private practice representing clients on federal and state consumer protection issues, including TCPA compliance.

Based on these years of experience, the facts set forth below and for the reasons stated herein, it is the opinion of the undersigned that the Federal Communications Commission (FCC) would hold that use of Echo during outbound telemarketing calls made to residential telephone numbers does not violate the TCPA or its implementing regulations recently amended by the FCC on February 15, 2012.

### **Factual Basis**

Echo is not a pre-recorded messaging platform, automated ROBO call system or a hardware solution that replaces "live agent" interaction with consumers. The Echo technology merely substitutes sound files for the agent's voice (although the agent can also interject with his or her own voice at any time) and assures positive interactive experiences for the consumer. CallAssistant's agents interact with callers by selecting the appropriate audio file responses. Agents have access to "hot keys" connected to common conversational responses such as "I understand," "exactly," "yeah," and laughing. The customer experiences a completely natural conversation complete with laughing, positive affirmation, and most importantly, natural interaction. While extremely rare and highly unusual in nature, there are times when a customer will ask a question for which there is no pre-recorded response; in which case, the agent can interject with his or her own voice or select a response essentially saying that they are not trained or authorized to address said concern and will then transfer the call to a manager.

### **Applicable Law**

This opinion addresses the FCC's enforcement of the TCPA. In pertinent part, the TCPA provides: It shall be unlawful for any person...to initiate any telephone call to any residential telephone line using an ***artificial or prerecorded voice to deliver a message*** without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by [the FCC].<sup>2</sup> The FCC's TCPA regulations likewise prohibit persons from initiating "any telephone call to any residential line using an ***artificial or prerecorded voice to deliver a message*** without the prior express consent of the called party" unless an exemption applies.<sup>3</sup> Exemptions include non-telemarketing calls and calls made to consumers with whom the caller has an established business relationship (EBR).<sup>4</sup> Further, on

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<sup>1</sup> 47 USC § 227

<sup>2</sup> 47 USC § 227(b)(1)(B) (emphasis added).

<sup>3</sup> 47 CFR 64.1200 (emphasis added).

<sup>4</sup> *Id.* at 64.1200(a)(2).

February 15, 2012, the FCC approved amendments to its TCPA regulations.<sup>5</sup> Once effective, the amended regulations will require "prior express **written** consent" to deliver prerecorded telemarketing calls to residential numbers (unless an exemption applies) and delete the current EBR exemption.<sup>6</sup>

## **Legal Analysis**

### **The Intent of the TCPA was Not to Prohibit Real Time Two-Way Telephone Communications**

Several factors show that Congress did not intend for the TCPA to prohibit real time two-way communications with consumers via residential telephone lines. First, the Congressional Record demonstrates that "Congress determined that...prerecorded messages cause greater harm to consumers' privacy than telephone solicitations by **live** telemarketers."<sup>7</sup> The FCC elaborated on this when it cited consumers' frustrations with answering machines full of prerecorded messages and consumers' inability to stop receiving messages and/or make do not call requests as reasons for the different treatment of prerecorded messages.<sup>8</sup> These concerns, however, are not present on calls that utilize Echo.

Second, the express language of the TCPA prohibits the use of an "artificial or prerecorded voice to deliver a message" without the call recipient's prior express consent. The terms "artificial or prerecorded voice," "deliver" and "message" are not defined in the statute or FCC regulations; however, when used in conjunction, the terms imply a **one-way prerecorded communication** that provides no opportunity for the call recipient to interact with the sender of the message. This interpretation comports with the intent of Congress and the FCC to address the consumer concerns identified above.

Finally, other TCPA provisions provide context regarding Congress' intent. For example, the provision relating to calls to cell phones applies to "any call...using any automatic telephone dialing system or an artificial or prerecorded voice."<sup>9</sup> If Congress intended to prohibit calls to residential lines that allow real time two-way communications, it could have broadly prohibited all calls made using an automatic telephone dialing system. Instead, the prohibition is limited to calls that use an artificial or prerecorded voice to **deliver a message**. Similarly, the TCPA requires certain disclosures to be made at the beginning of each prerecorded message.<sup>10</sup> If the use of a recorded audio file to communicate with a consumer during a real time conversation constitutes delivering a prerecorded message, such disclosures would be required numerous times during the same call. Clearly Congress did not intend such a result.

When the TCPA was enacted in 1991, Congress likely did not anticipate technological advancements that now allow agents to communicate in real time with consumers using recorded audio files. Regardless of whether Congress initially anticipated technological advancements, it is clear that the use of Echo does not result in the type of consumer nuisance or harm that Congress and/or the FCC sought to prevent. Furthermore, Congress specifically stated that the intent of the TCPA is to protect consumers' privacy interests while permitting legitimate business practices.<sup>11</sup> The use of Echo comports

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<sup>5</sup> See [FCC Report and Order 12-21, dated 2-15-2012](#).

<sup>6</sup> *Id.* at 31 (emphasis added).

<sup>7</sup> 18 FCC Rcd 14014 at ¶ 139 (emphasis added).

<sup>8</sup> *Id.* at ¶ 137.

<sup>9</sup> 47 USC 227(b)(1)(A).

<sup>10</sup> See 47 USC § 227(d)(3).

<sup>11</sup> 102 P.L. 243, 2.

with this intent because it allows businesses to effectively communicate with their customers on a real time basis without causing the consumer harm and/or nuisance associated with prerecorded messages.

*The FCC's Recent Amendments Were Made to Harmonize FTC And FCC Regulations*

The FCC specifically stated that the purpose of the amendments approved February 15, 2012 was to maximize consistency with the Federal Trade Commission's (FTC) Telemarketing Sales Rule (TSR) in accordance with the Do-Not-Call Implementation Act (DNCIA), which requires the FCC to consult and coordinate with the FTC to maximize consistency between their rules. To accomplish this, the FCC modified its rules to, among other things, require "prior express written consent" for telemarketing calls using an artificial or prerecorded voice to deliver a message to a residential number. The amended regulations are virtually identical to the TSR, which prohibits persons from "initiating any outbound telephone call that ***delivers a prerecorded message*** [without the express written consent of the call recipient]"<sup>12</sup>

In 2009, the FTC provided an advisory opinion stating that use of Echo technology does not violate the TSR because it only prohibits "calls that deliver a prerecorded message and do not allow interaction with call recipients in a manner virtually indistinguishable from calls conducted by live operators."<sup>13</sup> The FTC elaborated by stating that "unlike [Echo], the delivery of prerecorded messages in such calls does not involve a live agent who controls the content and continuity of what is said to respond to concerns, questions, comments-- or demands-- of the call recipient."<sup>14</sup>

By holding that the TSR does not apply to Echo, the FTC held that playing recorded audio segments as part of a two-way communication between the caller and call recipient does not constitute the "delivery" of a prerecorded message. The pertinent parts of the TSR and amended TCPA regulations contain virtually identical language and the FCC has expressly stated its intention to harmonize the agencies' rules; therefore, the FTC's advisory opinion demonstrates how the FCC would view the use of Echo during calls made to residential numbers.

**Conclusion**

Based on the veracity of the facts as set forth above and provided to the undersigned, it is our opinion that the FCC would hold that the TCPA does not prohibit the use of Echo during telemarketing calls made to residential numbers.

Sincerely,



Michele A. Shuster

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<sup>12</sup> 16 CFR 310.4(b)(1)(v) (emphasis added).

<sup>13</sup> [FTC Advisory Opinion 09-1](#) at 2.

<sup>14</sup> *Id.*